

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

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|--|---|----------------------|
| 2014 Quadrennial Regulatory Review – |) | |
| Review of the Commission’s Broadcast |) | |
| Ownership Rules and Other Rules Adopted |) | MB Docket No. 14-50 |
| Pursuant to Section 202 of the |) | |
| Telecommunications Act of 1996 |) | |
| |) | |
| 2010 Quadrennial Regulatory Review – |) | |
| Review of the Commission’s Broadcast |) | |
| Ownership Rules and Other Rules Adopted |) | MB Docket No. 09-182 |
| Pursuant to Section 202 of the |) | |
| Telecommunications Act of 1996 |) | |
| |) | |
| Promoting Diversification of Ownership In |) | MB Docket No. 07-294 |
| the Broadcasting Services |) | |
| |) | |
| Rules and Policies Concerning Attribution of |) | |
| Joint Sales Agreements in Local Television |) | MB Docket No. 04-256 |
| Markets |) | |

OPPOSITION TO PETITIONS FOR RECONSIDERATION

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January 24, 2017

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SUMMARY

The NAB and Nexstar petitions for reconsideration should be dismissed and/or denied. In particular, as UCC, *et al.* have shown in their Motion to Strike and Dismiss, the NAB's petition violates the Commission's 25 page limit and its summary exceeds two pages.

That aside, there are three threshold reasons to reject the petitions. First, the Commission lacks authority to repeal or modify its broadcast ownership rules until it can assess the impact of any such changes on opportunities for station ownership by women and minorities. Second neither petition mentions, much less challenges, the Commission's threshold determination that it is premature to change the media ownership rules before it has had a chance to evaluate the "dramatic effect" that spectrum auctions will have on the broadcast marketplace. Third, the NAB improperly relies on late-filed submissions that should have been submitted earlier.

The Commission properly decided to retain the local TV ownership rule, and properly refused to consider an economic study the NAB submitted shortly before the Commission released the 2d R&O. Even if the Commission decides to consider it, the study does not undermine the FCC's rationale for the rule because the NAB's central claim regarding the study's econometric analysis is not relevant. To the extent that NAB and Nexstar's arguments are not based on late-filed submissions, all of their legal and factual arguments were thoroughly and persuasively addressed in the Commission's decision.

The Commission also reasonably decided to retain the cross-ownership rules. The Commission has repeatedly considered and rejected NAB's argument that the NBCO rule is unjustified because consumers have access to a multitude of voices, and cites ample evidence in the record to support the finding that ownership affects content. Moreover, contrary to NAB's claim, the Commission properly determined that newspapers and broadcast outlets persist as the

principal source of local news and opinion.

It is surprising that a trade association dedicated to extolling the accomplishments of its members would claim that radio does not contribute to viewpoint diversity. The Commission's retention of its finding that radio contributes to viewpoint diversity is not, as the NAB says, an about face. The Commission's decision is supported by powerful evidence of how radio helps inform communities on social, cultural and political issues, and especially communities of color.

Contrary to Petitioners' argument that attributing JSAs makes the Local TV rule more stringent, the Commission properly decided that failure to attribute would undermine the Local TV rule because JSAs can compromise the independence of local television stations. The decision further cites extensive evidence that JSAs permit one station to influence the programming of another in-market station, and to produce and air identical news programming on multiple stations in the same market. The Commission also properly decided to require disclosure of SSAs, a rule that—contrary to NAB's claim—does not require disclosure for the sake of disclosure, but rather is tied to a clear regulatory purpose and gives the Commission information it needs to meet its statutory responsibilities.

NAB also asks the Commission to reverse its determination and to create a loophole to the ownership rules by creating an incubator program. It is unclear, however, exactly what program the NAB seeks to establish, and it does not even attempt to explain why the Commission was in error in finding (at ¶321 of its decision) that the NAB's proposal "would be administratively inefficient, unduly resource-intensive, and potentially inconsistent with First Amendment values."

OPPOSITION TO PETITIONS FOR RECONSIDERATION

Office of Communication, Inc. of the United Church of Christ (UCC), Media Alliance, National Organization for Women Foundation, Communications Workers of America (CWA), The Newspaper Guild (TNG-CWA), National Association of Broadcast Employees and Technicians (NABET-CWA), Common Cause, Benton Foundation,¹ Media Council Hawai'i, Prometheus Radio Project, and Media Mobilizing Project (UCC, *et al.*) respectfully oppose Petitions for Reconsideration of the Commission's August 25, 2016 decision on these dockets: 14-50, 09-182, 07-294, 04-456,² concluding both the 2010 and 2014 Quadrennial Reviews (QR) filed by the National Association of Broadcasters (NAB) and Nexstar Broadcasting, Inc. (Nexstar).

At the outset, UCC, *et al.* note that they have separately moved to strike and dismiss the NAB Petition for failure to comply with the Commission's strict 25 page limit and for filing an impermissibly long summary. But even if the Commission considers NAB's arguments, it should reject them along with those of Nexstar for failure to raise arguments or facts that the Commission has not already thoroughly considered and correctly decided in its comprehensive 2d R&O.

Moreover, other factors specific to this case compel dismissal and/or denial of the petitions. The US Court of Appeals, which has retained jurisdiction over the remand in *Prometheus III*,³ directed the Commission to assess the impact of any repeal or modification of an ownership rule on opportunities for station ownership by women and minorities. The

¹ The Benton Foundation is a nonprofit organization dedicated to promoting communication in the public interest. These comments reflect the institutional view of the Foundation and, unless obvious from the text, are not intended to reflect the views of individual Foundation officers, directors, or advisors.

² 2014 Quadrennial Review - Second Report and Order, 31 FCCRcd 9864 (2016) (2nd R&O).

³ *Prometheus Radio Project v. FCC*, 824 F.3d 33, 57 (3d Cir. 2016).

Commission has conducted no such assessment in the 2d R&O. Moreover, neither petition mentions, much less challenges, the Commission's threshold determination that it is premature to change the media ownership rules before it has had a chance to evaluate the "dramatic effect" that spectrum auctions will have on the broadcast marketplace.

I. The FCC May Not Modify or Repeal the Ownership Rules Unless and Until It Completes the Analysis Required by the *Prometheus III* Court

In *Prometheus I*, the Court reversed the Commission's effort to repeal one of its ownership rules, the so-called FSSR, because "[b]y failing to mention anything about the effect this change would have on potential minority station owners***the Commission entirely failed to consider an important aspect of the problem."⁴ In *Prometheus II*, the Court again remanded, based in part on the inadequacy of the Commission's analysis of the effect of its actions on minority and female ownership. The Court reiterated that such determinations are a prerequisite to any changes in the Commission's ownership rules:

Promoting broadcast ownership by minorities and women is, in the FCC's own words, "a long-standing policy goal of the Commission, and is consistent with [the Commission's] mandate under [§] 309(j) of the Act"*****However, the Commission appears yet to have gathered the information required to address these challenges, which it needs to do in the course of its review already underway. As ownership diversity is an important aspect of the overall media ownership regulatory framework, see *Prometheus I*, 373 F.3d at 420–21, we re-emphasize that the actions required on remand should be completed within the course of the Commission's 2010 Quadrennial Review of its media ownership rules.⁵

In *Prometheus III*, the Third Circuit remanded yet again because the Commission had failed to collect the information necessary to adopt a socially disadvantaged business (SDB) definition.

⁴*Prometheus Radio Project v. FCC*, 373 F.3d 372, 420-21 (3d Cir. 2004)(citations omitted).

⁵*Prometheus Radio Project v. FCC*, 652 F.3d 431, 472 (3d Cir. 2011).

Absent an acceptable definition, the Commission cannot examine ways that it can adjust its rules to promote minority and female ownership and cannot assess the impact of changed rules on minority and female ownership.⁶

The 2d R&O merely readopts the same SDB definition already rejected by the Third Circuit.⁷ And, as was the case in each of the three prior Commission QR decisions, the 2d R&O is bereft of reliable data on minority and female ownership and does not provide a basis upon which the Commission could support any decision to repeal or modify any of its ownership rules. As such, the Commission cannot grant the relief requested by Nexstar or NAB.

II. The FCC Appropriately Decided to Wait Until it can Assess the Results of the Television Incentive Auction Before Making Significant Changes

The 2d R&O observes that the television industry is “on the precipice of great change” due to the voluntary incentive auctions of broadcast spectrum. Although the Commission acknowledges that the auction may have a dramatic effect on local television marketplaces, it found it was “too soon to quantify this impact” and “it would be premature to change our media ownership rules in anticipation of the incentive auction’s impact at this time.”⁸

In discussing the Local TV rule in particular, the Commission reiterated that “it is impossible at the present time to analyze the implications of the incentive auction for the [Local TV rule] generally, or minority and female ownership specifically.”⁹ It explained that the incentive auction is ongoing, and the identities of participating stations are confidential. Some television stations may go dark, opt to share a channel with another licensee, or move to a

⁶*Prometheus III*, 824 F.3d at 49-50.

⁷2d R&O at ¶279.

⁸*Id.*, at ¶2.

⁹*Id.*, at ¶80.

different band. Since the incentive auction is “without precedent,” the Commission has no basis to predict the likely effects.

Additionally, the 2d R&O explains that the decision in *Prometheus III* required it to consider how incentive auctions affect minority and female ownership.¹⁰ After evaluating the record, the Commission also concluded it was too soon to make this determination. Until the Commission can make this determination, it may not repeal or significantly alter the local TV rule.

III. Neither Petition Raises Arguments or Facts Not Previously Addressed by the Commission

The NAB and Nexstar petitions are based entirely on arguments that were thoroughly and correctly rejected by the Commission and/or were improperly presented long after the deadline for submission of new arguments.

Reconsideration generally is appropriate only where the petitioner shows either a material error or omission in the original order or raises additional facts not known or not existing until after the petitioner's last opportunity to respond.¹¹

Dismissal is proper here because the petitions

Rel[y] on arguments that have been fully considered and addressed by the Commission within the same proceeding...fail[] to identify any material error or omission warranting reconsideration, [and] rel[y] on arguments not previously presented to the Commission....¹²

¹⁰ *Id.*, at ¶81, citing *Prometheus III*, 824 F.3d at 54, n. 13.

¹¹ *AT&T Inc. and Cellco Partnership D/B/A Verizon Wireless*, 30 FCCRcd 992, 994 at ¶7 (2015)(citation omitted). *See also, Promoting Diversification of Ownership in the Broadcasting Services*, DA 17-5, January 4, 2017, at ¶6 (citation omitted); *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, 29 FCCRcd 7515, 7518 at ¶7 (2014)(citations omitted).

¹² *Id.*, 30 FCCRcd 995 at ¶7.

A. The Commission’s Decision to Retain the Local TV Rule is Reasonable and Supported by the Record

NAB’s argument for repealing the local television rule is based primarily on the Commission’s failure to consider an economic study NAB submitted shortly before the Commission released the 2d R&O.¹³ The Commission, however, properly refused to consider this study.¹⁴ The Commission does not consider late-filed comments, and NAB provided no justification for submitting the study after it knew the 2d R&O had been circulated and three Commissioners already voted for the item. Further, given the complexity of this econometric study, a great deal of additional time would have been required for the public to comment and the Commission staff to evaluate it. The Commission correctly concluded that “consideration of this extremely late-filed study would cause undue delay and would be contrary to the Third Circuit’s expectation that the Commission will move quickly to resolve this proceeding and the Commission’s commitment to do so.”¹⁵

Nonetheless, if the Commission decides to consider this study, it does not undermine the FCC’s rationale for the Local TV rule. NAB’s central claim is that the study’s “econometric analysis showed that, holding other factors constant, local advertising rates are no higher in markets with fewer than eight independent voices.”¹⁶ Even if true, this claim about advertising rates is not relevant to “the primary purpose” of the Local TV rule and the eight-voices test, which is to promote competition in local television viewing (especially news), not competition in

¹³ NAB Petition for Reconsideration at 5 (NAB Pet.), citing Kevin W. Caves and Hal J. Singer, *An Economic Analysis of the FCC’s Eight Voices Rule* (July 19, 2016).

¹⁴ 2d R&O at n. 147. The same analysis applies to the other NAB submissions, and they should be excluded from consideration in the Commission’s disposition of the petitions. NAB Pet. at 5-10, citing *ex parte* letters filed on June 6, June 21, July 15, July 19, July 28, 2016.

¹⁵ *Id.* NAB, of course, remains free to resubmit the study in the 2018 QR.

¹⁶ NAB Pet at 7. It is unclear whether this study took into effect JSAs that effectively reduce the number of competitors.

local advertising rates.¹⁷ Moreover, the asserted “efficiency benefits” of increased concentration can only be obtained by contravening the Commission’s goal of increased viewer competition.¹⁸

B. The Commission’s Decision to Retain the Cross-Ownership Rules is Reasonable and Supported by the Record

NAB argues the NBCO rule is unjustified because consumers have access to a multitude of voices. However, NAB and others have made this argument repeatedly, and the Commission has repeatedly considered and rejected it.¹⁹ To the extent that NAB cites last-minute *ex parte* filings, they should be excluded from the record for the reasons discussed above.²⁰ NAB also argues there is no evidence that ownership affects content. Contrary to NAB’s claim, however, the Order cites “ample evidence” to support the finding that ownership affects content.²¹

NAB also incorrectly claims the Commission lacks support for its finding that cross-

¹⁷ 2d R&O at ¶¶58-59.

¹⁸ NAB’s late-filled econometric study refers to the procompetitive benefits of broadcast station mergers, but this refers to competition for *advertisers*, not viewers. See July 19 *ex parte* (Cave and Singer Study at 7 n. 9) (“television broadcasting generally, and local news production specifically, are subject to strong economies of scale and scope, and [ownership limits] result in higher costs”). A JSA that shuts down a local newsroom decreases costs and allows the second station to compete for advertisers with lower rates. This result, however, is only obtained by reducing competition for viewers.

¹⁹ *Id.*, at ¶130.

²⁰ Even if the Commission were to give any weight on NAB’s late-filed “evidence,” NAB dramatically overstates the findings of the Pew Research Center study included with NAB’s July 15, 2016 *ex parte* submission. That study largely addressed readership and viewership, not influence on local issues. While it found an erosion in newspaper circulation, it noted (at 11) the continuing and “heavy reliance on the print product” and it supported the Commission’s view that print is the original source of a great deal of material which makes its way to other outlets. As to local TV news, the study found slight increases in viewership in prior years, but a slight downturn in 2016. However, it found (at 29) that local TV continues to perform strongly, and that “U.S. adults continue to report turning to local TV in greater numbers than many other news sectors.”

²¹ 2d R&O at ¶144. The President certainly shares the view that owners influence content on outlets such as the *New York Times*, <http://tinyurl.com/zx97hbp>, the *New York Daily News*, <http://tinyurl.com/zqsovecc>, CNN, <http://tinyurl.com/j5scbsg>, and the *Washington Post*, <http://tinyurl.com/z7zn2zy>.

ownership harms localism by reducing the diversity of information sources.²² NAB seeks to define the marketplace of ideas as including all manner of non-local media. To the contrary, the Commission properly showed that cable and satellite programming do not meaningfully contribute to coverage of local issues,²³ over-the-air television stations and local newspapers remain by far the most important forces shaping opinion on local issues, “local news and information available online usually originates from traditional media outlets” and “local, hyperlocal and niche websites generally do not fill the role of local television stations or daily newspapers.”²⁴ While the Internet is surely a welcome and important vehicle for the redistribution of journalism produced by newspapers and broadcast stations, NAB is far off base contending the Commission ignored its influence in finding that newspapers and broadcast outlets persist as the principal source of local news and opinion.²⁵

C. The Commission’s Decision to Retain the Radio-Television Cross-Ownership was Reasonable and Supported by the Record

It is surprising that NAB, a trade association dedicated to extolling how its members serve local communities, would claim radio stations do not contribute to viewpoint diversity. NAB incorrectly characterizes the 2d R&O as an “abrupt reversal of the FCC’s long standing

²² NAB Pet. at 15-20.

²³ In its challenge to the local TV rules, Nexstar cites (at 5) to a study that addresses coverage of the Presidential election. This has no bearing on local issues.

²⁴ 2d R&O at ¶148.

²⁵ NAB had to search over seven years’ worth of statements to find two quotes it could use out of context to claim that Common Cause and NHMC somehow do not support diversity in broadcast ownership because of the advent of the Internet. NAB Pet. at n. 59. To say that the Internet adds to civic discourse is hardly the same thing as arguing that there is no need for diversity in ownership of major media outlets. To the contrary, just before the sentence quoted by NAB from NHMC’s 2010 comments, NHMC explained that its hope for a more diverse Internet was precisely because “[a]s traditional media undergo more and more consolidation, the Latino voice over broadcasting and cable – which was never very loud to begin with – is fading.” NHMC Comments, Dkt. No. 09-191 (January 14, 2010) at 6.

view of radio's role in the media marketplace.”²⁶ In fact, the 2d R&O is consistent with the 2006 QR order retaining the rule, which the Third Circuit upheld.²⁷ NAB improperly relies on “tentative conclusions” in the NPRM and FNPRM that were never adopted by the Commission.

In concluding the 2010 and 2014 QRs, the Commission carefully weighed the evidence and properly determined that the “record shows that broadcast radio stations produce a meaningful amount of local news and information content that is relied on by a significant portion of the population and, therefore, provide significant contributions to viewpoint diversity.”²⁸ Nor is it unreasonable, as NAB claims, for the FCC to rely on a study published in 2013, instead of newer information that NAB improperly submitted after a majority of the Commission had voted on the Order.²⁹

D. The Commission's Decision to Attribute Certain JSAs is Reasonable and Supported by the Record

NAB and Nexstar seek reconsideration of the Commission's readoption of the JSA rule by repeating the same argument they used in the past, that attributing JSAs makes the Local TV rule more stringent. However, the 2d R&O properly explains that JSAs do not make the rule more stringent; rather, because JSAs can compromise the independence of local television stations, the failure to attribute those meeting its criteria would undermine the Local TV rule.³⁰ NAB also falsely complains that the record is devoid of examples where JSAs influenced a

²⁶ NAB Pet. at 21.

²⁷ 2d R&O at ¶¶199-201.

²⁸ 2d R&O at ¶154.

²⁹ NAB's other arguments are meritless. It attempts to diminish NHMC's powerful example of radio stations mobilizing listeners to participate in local immigration rallies, by making the absurd argument that a local event cannot be considered local if the issue discussed also involves national legislation. See NAB Pet. at n. 67 (citing NAB *ex parte* (Jul. 15, 2015)).

³⁰ 2d R&O at ¶64.

single programming decision.³¹ In fact, evidence shows many, if not most, JSAs permit one station to influence the programming of another in-market station, and often, produce and air identical news programming on multiple stations in the same market.³² Even Nexstar’s own examples in the record of purported public interest benefits derived from JSAs are actually public interest detriments because they result in the airing of identical programming in the same market, decreasing the diversity of programming.³³

E. The Commission’s Decision to Require Disclosure of SSAs is Reasonable and Supported by the Record

NAB alone asks the Commission to reverse or significantly narrow its decision requiring disclosure of shared services agreements (SSAs), claiming that the “new rule epitomizes disclosure for the sake of disclosure.”³⁴ This description grossly mischaracterizes what the Commission did and why. For example, NAB claims that the definition of SSA encompasses agreements related to janitorial, catering and security service, when in fact, the 2d R&O explains that the scope of agreements is limited to “those that involve station-related services,” and is not intended to apply to incidental agreements or those unrelated to stations’ operations, such as

³¹ NAB Pet. at 12.

³² See, e.g., NABET-CWA *ex parte* (Mar. 12, 2014) at 2-3 (citing examples of arrangements, including JSAs, that have resulted in identical or simulcast news coverage by stations in the same market).

³³ See attachment to Nexstar Comment, Dkt. No. 04-256 (Aug. 6, 2014)(listing “examples of the specific public interest benefits derived from the SSA/JSA relationships [with Mission] . . . during 2012 and 2013”). These examples, to name just a few, include simulcast weather and news reports, and the creation of a “political simulcast” for two stations in Little Rock – Pine Bluff, AR (p. 4); a lifestyle and entertainment program that is aired on two different stations in Springfield, MO (p. 4); and an “In-Depth” news segment aired during news programming on two different stations in Evansville, IN (p. 6).

³⁴ NAB Pet. at 13.

charitable collaborations.³⁵ The 2d R&O provides several examples to illustrate the types of collaborations that should be disclosed.

Likewise, NAB accuses the Commission of failing to identify how disclosure serves the Commission's policy goals. However, the Commission previously considered NAB's arguments and determined that the "disclosure requirement is tied to a clear regulatory purpose."³⁶ Finally, the Commission explained that without disclosure, it lacked the information to determine the extent to which SSAs affect diversity, competition and localism and whether an unauthorized transfer of control has taken place.³⁷ Thus, the rule does not require disclosure for the sake of disclosure, but rather gives the Commission information it needs to meet its statutory responsibilities.

F. NAB Provides No Reason to Reconsider Proposals for an Incubator Program

Finally, NAB devotes a single, brief paragraph on the last page of its Petition seeking reconsideration of the Commission's "rejection of an NAB proposal to create an incubator program."³⁸ In fact, NAB's earlier comments did not make a specific proposal, but merely urged the Commission to "[a]dopt an incubator program that provides broadcasters with incentives to finance qualifying businesses."³⁹

³⁵ 2d R&O at ¶¶346-47.

³⁶ *Id.* at ¶354. It provides examples of how SSAs can convey a significant degree of influence over a station's core operations, such as producing local news.

³⁷ *Id.* at ¶360.

³⁸ NAB Pet. at 25, citing NAB Comment at 92-93.

³⁹ NAB Comment at 93.

For many years, various incubator proposals have been proposed by MMTC.⁴⁰ In the 2010 FNPRM, the Commission tentatively concluded that an incubator program could create a dangerous loophole and adopting any eligible entity standard would pose significant legal, administrative and practical challenges.⁴¹ The Commission sought additional comment on this tentative conclusion, but NAB failed to offer any new ideas or support in its 2014 comments. NAB's Petition for Reconsideration likewise offers nothing new and does not even attempt to show how the Commission had erred in its decision.⁴² In fact, the 2d R&O pointed to many policy and practical concerns with administrative and definitional problems regarding such programs in general, and approvingly cited comments showing they "could create a substantial loophole in the Commission's ownership rules without having any significant impact on minority and female ownership."⁴³ The Commission specifically considered and rejected the ODP proposed variant of an incubator program as being particularly troublesome because it would involve use of an individualized analysis that "would be administratively inefficient, unduly resource-intensive, and potentially inconsistent with First Amendment values."⁴⁴

IV. Conclusion

WHEREFORE, UCC, *et al.*, urge the Commission to dismiss or deny NAB's Petition for Reconsideration, to deny Nexstar's Petition for Review and to grant all such other relief as may be just and proper.

⁴⁰ Initial Comments of the Diversity and Competition Supporters in Response to the Notice of Proposed Rulemaking, Dkt. Nos. 09-182 and 07-294 at 22.

⁴¹ 2014 Quadrennial Review, *Further Notice of Proposed Rulemaking and Report and Order*, 29 FCCRcd 4511, 4515 (2014) at ¶313.

⁴² NAB Pet. at 25.

⁴³ 2d R&O at ¶320, quoting Reply Comments of UCC *et al.* at 25.

⁴⁴ 2d R&O at ¶321.

Respectfully submitted,

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January 24, 2017

CERTIFICATE OF SERVICE

I, David Nayer, hereby certify that on this 24th day of January, 2017, a copy of the foregoing Opposition to Petitions for Reconsideration, was served by first-class mail, postage prepaid, upon the following:

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